No.

In The Supreme Court of The United States

October Term, 1960

PAUL JEROME ACCARDY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA, AND TO THE DISTRICT COURT OF APPEAL, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA

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IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1960

_____

NO. _____

PAUL JEROME ACCARDY,

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vs.

THE PEOPLE OF THE STATE
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Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CALIFORNIA,
AND TO THE DISTRICT COURT OF APPEAL,
FOURTH APPELLATE DISTRICT,
STATE OF CALIFORNIA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal, Fourth Appellate District, State of California, originally filed August 19, 1960; and of the Order of the District

Court of Appeal, Fourth Appellate District, State of California, made September 8, 1960, denying the petition for rehearing filed by petitioner; and from the Order of the Supreme Court of the State of California made October 13, 1960, denying the petition for hearing in the Supreme Court of the State of California, after decision by the District Court of Appeal and denial of rehearing by the District Court of Appeal.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court of Appeal, Fourth Appellate District, State of California, filed August 19, 1960, is reported in 184 Advance California Appellate Decisions, 1, and is copied in Appendix "A" infra. The ruling of the District Court of Appeal in denying petitioner's application for rehearing on September 8, 1960, is set forth in Appendix "B" infra; the Order of the Supreme Court of October 13, 1960 denying the petition for hearing in the Supreme Court is reported in 54 A.C. No. 27 under date October 21, 1960 and is set forth in Appendix "C" infra.

QUESTIONS INVOLVED

1. When a state constitution provides "that the right of trial by jury shall be secured to all, and remain inviolate", can a trial court of that state, and the appellate courts of that state, deprive an accused of a jury trial on a fundamental fact question?

2. Is an individual denied due process of law and the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United

States (when his house is searched without a search warrant and an issue of fact as to whether or not he consented to such search is presented, and where the constitution provides for jury trial, and where the supreme court of the state has declared the question of voluntary consent to be a question of fact) by the act of the trial court in denying the accused a jury trial on the factual question of consent and the appellate courts of the state have ignored the constitutional question?

STATEMENT OF THE CASE

Petitioner was charged by information with violation of Health and Safety Code, section 11500 (unlawful possession of narcotics). After jury trial, a verdict of guilty was returned and the court granted probation for five years on preliminary conditions, inter alia, that petitioner serve the first ninety days in custody and pay a fine of $500.00.

Factually the record from the trial court shows in general substance, that petitioner operated a small store and soda fountain business; that his home was close by the rear of the store but not physically connected therewith nor under the same roof; to reach the petitioner's house from the back door of the store, one would turn left and walk at least eight to ten feet, turn right through the gate of the nine-foot board fence which separates the house and yard from the store and walk another 20 feet to the front door of petitioner's house which, in addition to being some distance from the store, was leased separately from the store and was on a separate lot; that he was not a licensed pharmacist; that on November 18, 1958, RAY BASCOM, Investigator for the California State Board of Pharmacy,

bought from petitioner certain articles for the dispensation of which a pharmacist's license is required, and one of which articles required a doctor's prescription because it contained a dangerous drug; that petitioner did not ask for nor receive a prescription in selling such articles; that on November 19th, BASCOM returned to petitioner's place of business with an officer of the San Diego Police Department and another inspector of the State Board of Pharmacy, and again purchased from petitioner, without a doctor's prescription, certain drugs which he could not lawfully dispense without a pharmacist's license and without a doctor's prescription; that on both occasions petitioner went to the storeroom toward the rear of the store and returned with the articles sold; that the rear of the store has a storeroom from the rear door of which, some distance away, access may be had to the separate residence of petitioner; that petitioner immediately after the sale to BASCOM on the 19th, was arrested by the officers there present on the misdemeanor charge of furnishing a dangerous drug, without a prescription (violation of Bus. & Prof. Code, section 4227); that the officers about an hour later entered the house and found there a considerable quantity of drugs in boxes in commercial quantities placed around the room on the floor; that these drugs consisted of miltown, secconal and amphetamines; and there were thirteen small bottles of paregoric; that analysis showed the paregoric contained .179 grains of morphine per fluid ounce plus opium.

(A) Concerning Narcotics

OFFICER BASCOM testified that he never bought anything containing a narcotic from petitioner, never asked petitioner to sell him a narcotic; and was not looking for narcotics when he went to petitioner's store.

(B) Conflicting Evidence on Consent

OFFICER BASCOM testified that when INSPECTOR DOWDY asked ACCARDY to let him in the house, ACCARDY said, "You can't go in the house. I know my rights. You can't search the house."

However, OFFICER BASCOM testified that at a later time, petitioner consented to the search. OFFICER DOWDY and the police officer corroborated BASCOM'S evidence as to consent.

ACCARDY took the witness seat to deny that he had ever given consent to the officer, or any of them, to either enter or search his house.

The opinion of the District Court of Appeal (see p. iii in Appendix "A") states:

> "The evidence was conflicting as to consent for the search."

The trial court disposed of petitioner's demand that the question of whether appellant consented to the search of his home or not should be submitted to the jury to be determined as a fact by holding that the admissibility of evidence is a question of law for the court. This ruling of the trial court was supported by the decision of the District Court of Appeal for the Fourth Appellate

District. (See page v Appendix "A".)

QUESTIONS PRESENTED TO STATE COURTS

Pursuant to rule 23, section (f), Rules of the Supreme Court, petitioner sets forth:

The questions involved here were first presented to the trial court by petitioner's objection to the evidence obtained as the result of the unlawful search; his request during the trial that the jury be permitted to pass upon the question of the alleged consent to the search; his request for instructions on the question of voluntary consent; upon his motion for new trial after conviction.

In petitioner's opening brief filed in the District Court of Appeal, the questions set forth were:

"1. It was error for the trial court to admit the evidence of the paregoric because it was only discovered when state officers searched appellant's home, without a warrant, up to an hour after they had arrested appellant in front of his store for an unrelated offense.

"2. It was error for the trial court to withhold from the jury the question of whether or not appellant consented to the unlawful search of his home."

In petitioner's reply brief filed in the District Court of Appeal, he again raised the question:

> "If the rights of any citizen under the Constitution of the United States are to be protected, then our appellate courts must adopt the view that when there is a controversy over the question of consent, the factual issues to be determined must fall within the constitutional right to a trial by jury."

In the petition for hearing in the Supreme Court, petitioner urged:

> "Because this case brings to this Court for the first time a question of law crucial to due process, and because the District Court's treatment of the case is out of line with the soundest modern judicial opinion including that of the United States Supreme Court, and, indeed is violative of due process, it is urged that this Honorable Court grant a hearing in this matter."

JURISDICTION

The jurisdiction of the court is involved under Title Number 28, U. S. Code, section 1257, and Rule 19 of the Revised Rules of the Supreme Court of the United States.

This petition for Certiorari is timely and filed within ninety days after the judgment of the Supreme Court of California, the court of last resort in the State of California. The judgment in the Supreme Court of California was made October 13, 1960.

Rule 27-B of the Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California, provides that the party seeking rehearing in a District Court of Appeal must serve and file a petition therefor within 15 days after the filing of the decision. Rule 28-B of said Rules provides that a party seeking a hearing in the Supreme Court must serve and file a petition therefor within 10 days after the decision of the District Court of Appeal becomes final as to that Court.

In the court below, the petition for rehearing in the District Court of Appeal, Fourth Appellate District, was served and filed within 15 days following August 19, 1960. On September 8, 1960, the District Court of Appeal, Fourth Appellate District, denied the petition for rehearing. Thereafter and within 10 days after the decision of the District Court of Appeal became final as to that court, a petition for hearing in the Supreme Court was filed as provided in Rule 28-B. The petition for hearing in the Supreme Court was denied October 13, 1960, and that Order became final as of October 13, 1960 and the Remittitur to the trial court by the District Court of Appeal, Fourth Appellate District was issued October 19, 1960.

PETITION TO EXTEND TIME

Should the Supreme Court adopt the view that this Petition for Certiorari should have been filed within ninety days after August 19, 1960, petitioner respectfully requests that the time for filing this petition and the certified record be extended for an additional period of sixty days as provided in Rule 22 of this court. The good cause is the belief of petitioner and

his counsel that petitioner had ninety days from the ruling of the Supreme Court of California within which to file his Petition for Certiorari and the certified record.

REASONS FOR GRANTING THE PETITION

The petitioner was denied the fundamental right to jury trial on an important and substantial question of fact.

The state court has squarely held that in a case where the sole question involved is whether or not an accused has consented to a search of his residence is solely a question of law to be decided by the court on the question of admissibility of evidence, even though there is a disputed question of fact concerning the question of consent; even though the officer testified that the defendant consented to the search but on the other hand the defendant denied that he had ever consented to his house being entered or searched; and even though Article I (section 7) of the Constitution of the State of California provides:

> ". . . that the right of trial shall be secured to all and remain inviolate."

and - even though Section 1042 of the Penal Code of California provides that issues of fact shall be tried in the manner provided in Article I (section 7) of the Constitution of the State of California.

No contention can be upheld that the search of the home of Petitioner ACCARDY was legal and incident to a lawful arrest. Hernandez v. Superior Court (1956)

143 Cal. App. 2d 20, which followed the ruling in Agnello v. U.S. (1925), 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145. This was not the basis of the decision of the District Court of Appeal.

The trial court and the higher courts of California, as petitioner contends, erroneously held that on the question of consent, petitioner was not entitled to the finding of the jury. The trial court and the upper courts held that because the question of admissibility of evidence is for the court, that the petitioner was not entitled to a finding of the jury on the question of consent. In so holding, both the trial court and the higher courts of California ignored the decision in People v. Michael (1955), 45 Cal. 2d 751 at 753, where the Supreme Court of California states:

> "Whether in a particular case an apparent consent was in fact voluntarily given or was in submission of an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances."

This exact language was used and the doctrine reiterated in People v. Fischer, (1957), 49 Cal. 2d 442 at 448.

The trial court and the higher courts refused to consider petitioner's contention that under the Constitution of the State of California he was entitled to a verdict of the jury on the factual question of whether or not he consented to the search of his home. The District Court of Appeal in its opinion completely avoided any reference to Article I, section 7, of the Constitution of the State of California and brushes off the question under

the heading "Admissibility of Evidence is a Question for the Court". (Appendix "A", page v).

In the early case of People v. Kilvington (1894) 104 Cal. 86, the Supreme Court of California, in reviewing a manslaughter conviction, recognized that when there is a disputed question of fact where the evidence is conflicting, that a jury question is involved.

People v. Paul, 149 Cal. App. 2d 609 at 619, establishes these two propositions:

1. That probable cause (parenthetically speaking, consent) is a question of law to be decided by the trial court rather than by the jury but this rule is applicable only when there is no conflict to be decided by the court.

2. When the facts are controverted or the evidence conflicting, then the determination of their legal effect by the court is necessarily hypothetical and the jury ought to be told that if they find facts in a designated way, then such facts do or do not amount to probable cause (parenthetically speaking, consent).

The District Court of Appeal in the concluding paragraph of its decision, attempts to "beef up" the decision by referring to People v. Lawrence, 168 Cal. App. 2d 510 but in that case on page 515 we find the following language:

> "Defendant argues that the things found during the search of his premises were illegally admitted in evidence, upon the theory that the arrest which preceded the search was illegal. Defendant

> unsuccessfully urged this point upon the former appeal. (People v. Lawrence, 149 Cal. App. 2d 435, 443-445. [308 P. 2d 82].)
>
> "The pertinent evidence upon retrial was substantially the same as upon the first trial. We concur in the analysis made and the views expressed by the reviewing court upon the former appeal."

In People v. Lawrence, 149 Cal. App. 2d 435, at 443-445 inclusive, the facts outlined indicate that there was a lawful arrest based upon probable cause and that the search incident to the lawful arrest made the search lawful.

The District Court of Appeal also relies upon People v. Guy, 145 Cal. App. 2d 481, but in that case likewise the question of validity of search turned upon the validity of arrest which was made upon the officer having a reasonable ground to believe that the defendant was committing a felony.

The District Court of Appeal cites also Gila Valley G. &. N. R. Co. v. Hall, 232 U. S. 94, 58 L. Ed. 521-525.

None of these cases turn on any factual question of consent, and do not support the conclusion arrived at by the District Court of Appeal.

THE GORG CASE

As the main basis for its ruling that "Admissibility of Evidence is a Question of Law for the Court", the District Court of Appeal in its opinion says that all questions involved in the appeal have been disposed of in People v. Gorg, 45 Cal. 2d 776, and the District Court of Appeal proceeds to quote verbatim from the Gorg case at pages 780 and 781.

What the trial court and the District Court of Appeal and the Supreme Court of California overlooked in the Gorg case is found on pages 782 and 783 as follows:

> "Defendant's main contention is that he did not consent to the search of his room. One can, of course, freely consent to the search of his property, and having done so,
>
> > 'any search or taking of evidence pursuant to his consent is not unreasonable. (Citations.) Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority is a question of fact to be determined in the light of all the circumstances.' (People v. Michael, ante, p. 751 (290 P. 2d 852.)
>
> "We said in People v. Boyles, supra, ante, p. 652 (290 P. 2d 535), in reference to an arrest without a warrant, that
>
> > 'since the court and not the officer must make the determination

whether the officer's belief is based upon reasonable cause, the officer must testify to the facts or information known to him on which his belief is based.'

"Similarly, where consent to search is claimed claimed by the People, evidence must be presented that will enable the court to determine for itself whether consent was in fact given. When the People seek to justify a search on ground that consent thereto was given, they have the burden of proving consent. (United States v. Reckis, 119 F. Supp. 687; Judd v. United States, 190 F. 2d 649, 651; Ray v. United States, 84 F. 2d 654, 656; United States v. Slusser, 270 F. 818, 819; United States v. Novero, 58 F. Supp. 275, 281.) The only evidence presented by the People bearing on the issue of consent was the testimony of Inspector Kiceler that he had defendant's permission to search his room, but under the facts and circumstances related therein, it is doubtful whether the officer was justified in concluding that defendant had freely consented to the search of his room or whether such consent, if given, included consent to repeated searches or was limited to the first search for other stolen articles. Thus, if that issue were crucial, it is doubtful whether the People sustained their burden of proving that defendant freely consented to the searches of his room. We have concluded however, that under the facts

> of this case his consent was not necessary." (Underlining ours.)

Thus, the GORG case does not support the decision of the District Court of Appeal.

ARGUMENT

The District Court of Appeal in its decision (Appendix "A", page vii) glibly announces:

> "The United States Supreme Court and California District Courts of Appeal have announced the same rule." NOT SO.

In this case it is not disputed that the question as to whether petitioner consented to the search of his home is a question of fact. See People v. Michael, (1955), 45 Cal. 2d 753. And in the case at bar, there is conflicting evidence concerning that fact. Under these circumstances the federal courts have held that there would be a violation of due process to withhold from the jury the final determination of whether petitioner voluntarily permitted the search. See; for example, U.S. v. Wheeler, (D.C. W.D. Pa. 1959), 172 F. Supp. 278, aff'd. 275 F. 2d 94, cert. denied 79 S. Ct. 111, rehearing denied 79 S. Ct. 229, where defendant was convicted of income tax evasion and claimed in his motion for new trial and an appeal that the government had obtained his records by trickery. He argued that although the trial judge could make a prima facie determination as to the admissibility of these records, it would violate due process to deprive him of the jury's determination as to whether he voluntarily surrendered the records. The

District Court and Circuit Court disagreed, but only because there was no conflict in the evidence as to his consent. See U.S. v. Wheeler, supra, 172 F. Supp. at pages 281-282:

> "Therefore, since no factual disputes were developed on the issues of voluntariness... there was nothing for the jury to decide with reference to the Fifth Amendment: "

Had there been a dispute as to the fact of his voluntary consent, as there is in the case at bar, there is no question but that the court would have followed the example of the Ninth Circuit in Charles E. Smith v. U.S., (9th Cir. 1959), 268 F.2d 416, where a conviction of forgery, supported with sufficient evidence, was reversed because the trial judge withheld from the jury the final determination as to whether certain admissions of the defendant were voluntarily made. In reversing, the court outlined the procedure which should have been followed:

> "Defendant has a right to have the jury pass upon the question of whether the admissions made by him were... made freely. The jury should be instructed that, unless they find beyond a reasonable doubt that the confession was freely and voluntarily made, they should not give any consideration to the admissions in weighing guilt or innocence of defendant." (Smith v. U.S., supra, p. 421.)

These federal decisions stem from the opinion of the United States Supreme Court in Daniel Smith v. U.S., (1954), 348 U.S. 147, 75 S.Ct. 194. In that case the defendant was convicted of income tax evasion, although he had attempted before and during the trial to suppress a five-page tax statement on the ground that it had been obtained from him by governmental promises which were not fulfilled. The trial judge ruled against petitioner on his pretrial motion but finally submitted the issue to the jury with the instruction that -

> "they were to reject the statement, and all evidence obtained through it, if 'trickery, fraud or deceit' were practiced on petitioner or his accountant." (348 U.S. at p. 151, 75 S.Ct. at p. 196.)

Approving this procedure, the Supreme Court, per Justice Clark, declared:

> "The issue of fraud or deceit on the part of Government agent was properly submitted to the jury...". (348 U.S. at 151, 75 S.Ct. at 196.)

In another Supreme Court case, Justice Black approved the rule that the jury is the final arbiter on questions of consent to self-incrimination, and describes it as the humane rule, saying:

> "...the trend seems to be that the judge should determine voluntariness in the first instance and if he finds the confession is voluntary then should submit the case to the jury with instructions not to consider the confession unless they also

> find it voluntary...I myself favor such a rule, which is particularly beneficial where...the question of admissibility turns to a large extent on the credibility of witnesses." (Emphasis added.) See U.S. v. Shotwell Mfg. Co. (1957), 355 U.S. 233, 78 S.Ct. 245, dissenting opinion by Justice Black, at page 249 of 355 U.S., and p. 255 of 75 S. Ct.

Although these observations by Justice Black (concurred in by Chief Justice Warren and Justice Douglas) were contained in a dissent, the majority did not disagree with them, but held they were inapplicable because the defendants had not raised the issue.

Of course, the cases thus far discussed were decided under the Fifth Amendment to the United States Constitution. But it is inconceivable that the due process clause of the Fourteenth Amendment and of the California Constitution (Art. I, Sec. 13) are less important to or less protective of the citizen's rights in this regard. Cf. People v. Cahan (1955) 44 Cal. 2d 434, at 436, where this Court speaks of the Fourth and Fourteenth Amendments to the United States Constitution and Art. I, Sec. 19 of the California Constitution without differentiation in regard to illegal searches. And compare Manford v. Singh (1919) 40 Cal. App. 700, 701.

Then, too, it may be argued that petitioner's cases deal with admissions and confessions. But underlying this case and those cited is the common stratum of an attempted use of evidence obtained from the defendant without his voluntary consent. Indeed, the claimed police infractions in the Daniel Smith and Wheeler cases above seem innocuous when compared with the tactics

petitioner asserts were used here. See Reporter's Transcript, page 171. Even if that were not so, the courts should be more vigilant in protecting the constitutional rights against illegal searches because,

> "...public opinion is not aroused (against such searches) as it is in the case of other violations of constitutional rights. Illegal searches and seizures lack the obvious brutality of coerced confessions..." People v. Cahan, supra, at page 448.

And again,

> "...deliberate, flagrant violations of the constitutional guaranties (against illegal searches)...may be as dangerous to ordered liberty as the coercion of confessions." (People v. Cahan, p. 442, continued from p. 441.

The Supreme Court of California has decided similar applicable questions in a manner comparable to the manner in which those questions have been decided by the federal courts.

The Supreme Court of California in several recent cases has made it abundantly clear that the question of whether one consents to an unlawful search is a question of fact. People v. Michael, supra, at 753. People v. Gorg, supra, at 782. People v. Fischer, supra, 448.

In People v. Gonzalez (1944) 24 Cal. 2d 870 at 877, it is held that where the question of voluntariness of a confession is involved, the court passes preliminarily on the question of the voluntary nature of the confession;

and even though the court may determine that the confession is voluntary and admissible, the ruling is not binding on the jury; and it is for the jury to determine in the last analysis whether a confession is freely and voluntarily made.

CONCLUSION

Because petitioner was denied a fundamental right of trial by jury guaranteed by the California Constitution, his conviction resulted from a denial of due process of law and the equal protection of the law, and that the errors of law presented herewith are both fundamental and substantial and warrant and require the granting of the Writ of Certiorari as prayed for herein.

THOMAS WHELAN

Attorney for Petitioner
PAUL JEROME ACCARDY

(Admitted to practice in the
SUPREME COURT OF THE
UNITED STATES
November 12, 1957)

APPENDICES

APPENDIX "A"

IN THE DISTRICT COURT OF APPEAL

FOURTH APPELLATE DISTRICT

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	) 4 Crim.) No. 1438
Plaintiff and Respondent,	)
vs.	) OPINION
PAUL JEROME ACCARDY,	)
Defendant and Appellant.	)

Dist. Court of Appeal - Fourth Dist.

FILED Aug 19 1960 E. J. VERDECKBERG. Clerk

_____ Deputy Clerk

APPEAL from a judgment of the Superior Court of San Diego County. John A. Hewicker, Judge. Affirmed.

Thomas Whelan, for Appellant.

Stanley Mosk, Attorney General, William E. James, Assistant Attorney General, and Jack K. Weber,

Deputy Attorney General, for Respondent.

Appellant was charged by information with violation of Health & Safety Code, section 11500 (unlawful possession of narcotics). After jury trial, a verdict of guilty was returned and the court granted probation for five years on preliminary conditions, inter alia, that defendant serve the first 90 days in custody and pay a fine of $500. Defendant appeals.

The record before us shows, in general substance, that appellant operated a small store and soda fountain business; that his home was immediately in the rear of the store but not physically connected therewith nor under the same roof; that he was not a licensed pharmacist; that on November 18, 1958, Ray Bascom, investigator for the California State Board of Pharmacy, bought from appellant certain articles for the dispensation of which a pharmacist's license is required, and one of which articles required a doctor's prescription because it contained a dangerous drug; that appellant did not ask for nor receive a prescription in selling such articles; that on November 19 Bascom returned to appellant's place of business with an officer of the San Diego Police Department and another inspector of the State Board of Pharmacy, and again purchased from appellant, without a doctor's prescription, certain drugs which he could not lawfully dispense without a pharmacist's license and without a doctor's prescription; that on both occasions appellant went out of sight toward the rear of the store and returned with the articles sold; that the rear of the store has a storeroom from the rear door of which, a few steps away, access may be had to the separate residence of appellant; that appellant immediately after the sale to Bascom on the

19th, was arrested by the officers there present on the charge of furnishing a dangerous drug without a prescription (violation of Bus. & Prof. Code, sec. 4227); that the three officers immediately took appellant to the storeroom in the rear of the store to search for the stock of drugs from which the sale had been made; that they were unsuccessful and inquired of appellant as to its location; that after considerable questioning appellant stated the stock of drugs was in the house at the rear and consented to the officers making a search of the house and taking the drugs; that the officers did enter the house and found therein a considerable quantity of drugs in boxes in commercial quantities placed around the room on the floor; that these drugs consisted of miltown, secconal and amphetamines, derivatives of barbituric acid and paregoric; that analysis of the paregoric showed it contained .179 grains of morphine per fluid ounce plus opium; that appellant had obtaines these drugs from a wholesale drug firm on a false representation to the firm that appellant had a pharmacist's license to dispense the drugs, giving a license number that belonged to a dentist who had no connection with appellant.

The evidence was conflicting as to consent for the search, who opened the door to appellant's house, whether or not a key was necessary therefor, whether or not additional words of consent were uttered by appellant upon entering the house, and what the representations of appellant were to the drug firm from whom he obtained the drugs. Substantially all the other material facts are not contradicted. There is no contention by appellant that his possession of the narcotic was lawful nor that it was not in violation of Health & Safety Code, section 11500.

EXPLORATORY SEARCH BAR DISPELLED BY CONSENT

Appellant first contends that it was error for the trial court to admit the evidence of the unlawful possession of the narcotic because it was discovered only by a so-called exploratory search following arrest for furnishing a dangerous drug without a license. That there was probable cause for the original arrest is not questioned by appellant. Business & Professions Code, section 4231, provides that "all stock of any dangerous drug of a ... pharmacy ... shall be at all times during business hours open to inspection by authorized officers of the law."

Due to the fact that appellant, in filling the orders on November 18 and 19, went to the back of the storeroom and that upon search of that storeroom the basic commercial supply of drugs from which the orders were filled could not be found, there was reasonable cause for the officers to believe that the source of supply was close at hand outside the storeroom, in or on other premises under appellant's control. The suggestion that the officers on completion of their search of the storeroom had all the evidence necessary for prosecution is a mere statement of opinion. Any competent trial lawyer or judge knows that there is no way to ever define just what quantum of evidence is necessary to convince a jury beyond a reasonable doubt of a defendant's guilt. The possession by appellant of a stock of drugs in commercial quantities would certain be corroborative evidence of the testimony of officers as to the facts leading to the arrest in this case, and would clearly be admissible as such, provided the evidence had been lawfully obtained. Every experienced officer realizes

his duty to pin down and marshall for later production in court every item of evidence, no matter how minute, connected with the offense for which the arrest was made, that it is practically feasible to obtain. In fact, such practice not infrequently turns up evidence that acquits the defendant, for a good officer gathers all the evidence, not just that which supports guilt. With this in mind, the statement of appellant that the drug supply was kept in appellant's home at the rear of the store furnishes ample reason for the search, and the consent of the defendant to that search disposes completely the question of the lawfulness of the search and it is unnecessary to discuss the question of whether or not the search would have been lawful without consent. We find nothing in People v. Mills, 148 Cal. App. 2d 392; People v. Schaumloffel, 53 A.C. 97; Hernandez v. Superior Court, 143 Cal. App. 2d 20; and Agnello v. United States, 269 U.S. 20, contrary to this view. In those cases consent was not present.

ADMISSIBILITY OF EVIDENCE IS A QUESTION OF LAW FOR THE COURT

Appellant next contends that the court erred in failing to submit to the jury the question of whether appellant consented to the search of his home. Code of Civil Procedure, section 2102, provides, as to this question, as follows:

> "QUESTIONS OF LAW ADDRESSED TO THE COURT. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other

writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to it."

Our Supreme Court has disposed of the matter as far as the California courts are concerned, in the following language, in People v. Gorg, 45 Cal. 2d 776, 780-781 (5-8):

"Defendant contends preliminarily that the trial court erred in determining the question of the admissibility of this evidence outside the presence of the jury and in not submitting it to them. The procedure adopted by the trial court was proper, for the admissibility of the evidence presented a question of law for the court. (Citations.) Defendant urges, however, that the same procedure should be followed as in the case of a confession, where the trial court initially determines the question of admissibility and then instructs the jury to disregard the confession if they find that it was not freely and voluntarily made. The rule of the confession cases is justified by the fact that the just must necessarily be informed of the circumstances surrounding the confession properly to evaluate it. The probative value of evidence obtained by a search or seizure, however, does not depend on whether the search or seizure was legal or illegal, and no purpose would be served by having the jury make a second determination of that issue.

> Moreover, the legality of a search or seizure will frequently depend on whether the officer had reasonable cause to make an arrest, and since such cause is not limited to evidence that would be admissible at the trial of the issue of guilt (Citation), evidence that was otherwise inadmissible and prejudicial would frequently be presented to them if the jury were required to pass on the legality of the search or seizure."

The U. S. Supreme Court and California District Courts of Appeal have announced the same rule. (Gila Valley, G. & N. R. Co. v. Hall, 232 U.S. 94, 58 L.Ed. 521, 525; People v. Lawrence, 168 Cal. App. 2d 510, 517 (8b); People v. Guy, 145 Cal. App. 2d 481, 490 (8).)

The judgment is affirmed.

SHEPARD
J.

WE CONCUR:

GRIFFIN
P.J.

COUGHLIN
J

APPENDIX "B"

"State of California, Clerk's Office

District Court of Appeal, Fourth Appellate District,

620 Ash Street, San Diego, Cal.

Sept. 8, 1960

No. 4 Crim. 1438

People etc.
vs.
Paul Jerome Accardy

By the Court:

The petition for rehearing is denied.

Dated: September 8, 1960

Griffin, P.J.

E. J. Verdeckberg, Clerk

By /s/ Geo J Kobelin
Deputy"

APPENDIX "C"

In 54 A.C. No. 27, published October 21, 1960, the minutes of the orders of Supreme Court dated October 13, 1960, read:

"(4th Crim. 1438) People v. Accardy (184 A.C.A. 1) Appellant's petition for hearing denied."